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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of others similarly situated, Plaintiff, vs. WAL-MART STORES, INC.; MENU FOODS INC; DEL MONTE FOODS COMPANY; SUNSHINE MILLS, INC.; CHEMNUTRA, INC.; and DOES 1 through 100, inclusive, Defendants.	Case No.: 2:07-cv-00682 **DEFENDANT DEL MONTE FOODS COMPANY'S OPPOSITION TO PLAINTIFF'S NOTICE OF RECENT AND SUPPLEMENTAL AUTHORITY** Date: Time: Place: Judge:

COMES NOW Defendant, DEL MONTE FOODS COMPANY ("Del Monte"), and files this Opposition to Plaintiff's Notice of Recent and Supplemental Authority. In support thereof, Del Monte sets forth the following:

On September 24, 2007, the Plaintiff filed a Notice with this Court concerning the United States District Court for the Southern District of California's decision in *Kennedy v. Natural Balance Pet Food, Inc., et. al.*, 2007 U.S. Dist. LEXIS 57766 (August 8, 2007).

Dockets.Justia.com

Defendant Del Monte respectfully submits that *Kennedy v. Natural Balance* does not speak to the issues before this Court with regard to the pending Fed. R. Civ. P. 12 (b) (6) motions.

Kennedy v. Natural Balance does involve an allegation that the marking "Made in the U.S.A." was improper. However, the similarities between *Kennedy v. Natural Balance* and the instant lawsuit end there. The Plaintiff in *Kennedy v. Natural Balance* advances two claims – a claim for violation of the California Consumer Legal Remedies Act ("CLRA"), and a claim for unfair competition in violation of California Business and Professions Code ("UCL"). Both of these claims are based on the marking of pet food as "Made in the U.S.A.."

The Defendants in *Kennedy v. Natural Balance* argued for dismissal on three grounds. First, Defendant Natural Balance Pet Foods, Inc. ("Natural Balance") argued that the Plaintiff failed to provide notice of suit as required under the CLRA. Second, Natural Balance asserted that the Plaintiff did not state a claim under the UCL because the alleged foreign rice protein was not "made" or "manufactured" in a foreign land within the meaning of the UCL. Third, Defendant Wilbur-Ellis Company ("Wilbur Ellis") argued that it played no role in the labeling, marking of the pet food products at issue and that Plaintiff failed to state a claim under either the CLRA or the UCL as against it.

The Court granted Wilbur Ellis' motion and dismissed all claims against it without prejudice. The Court also granted Natural Balance's motion in part and denied in part as well.

The instant lawsuit does not concern the CLRA or the UCL. Thus, the arguments advanced and decided in *Kennedy v. Natural Balance* are not analogous or instructive to those advanced by Del Monte. Del Monte has asserted arguments that are specific to the Nevada Deceptive Trade Practices Act ("DTPA"). To wit, Del Monte has argued that the Plaintiff has failed to state a claim for restitution, disgorgement and/or injunctive relief under the DTPA. *Kennedy v. Natural Balance* is of no import to this issue. The DTPA is a uniquely worded and different statute when compared to the CLRA and UCL. Further, the issue of restitution, disgorgement, and/or injunctive relief was not in question in *Kennedy v. Natural Balance*.

Further, Del Monte's motion to dismiss asserts that Plaintiff has failed to state a cause of action for unjust enrichment. This issue was not addressed by the Court in *Kennedy v. Natural*

Balance. Similarly, Del Monte's arguments regarding the lack of private cause of action under Federal Law were not addressed by the Court in *Kennedy v. Natural Balance.*

For the above reasons, *Kennedy v. Natural Balance* is of no value to this Court when deciding the motions to dismiss currently pending before it, and it was not necessary for this Court to be notified of this decision in a Notice of Recent and Supplemental Authority. None of the issues raised by Del Monte concerning Plaintiff's deficient Complaint were addressed by the court in *Kennedy v. Natural Balance.*

DATED: September 28, 2007.

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By: ______________________________

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